IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 14, 2008 Session

STATE OF TENNESSEE v. HUBERT RAY

Direct Appeal from the Criminal Court for Polk County
No. 05-048 Carroll Ross, Judge

No. E2007-02463-CCA-R3-CD - Filed July 1, 2009

The defendant, Hubert Ray, was convicted of aggravated sexual battery, a Class B felony, and was sentenced as a Range I, standard offender to ten years in the Tennessee Department of Correction. On appeal, he argues that: the evidence was insufficient to establish venue; the trial court did not properly instruct the jury; and he was sentenced improperly. After careful review, we conclude that the evidence was sufficient to establish venue and that the jury was properly instructed. However, the defendant's sentence was enhanced by applying enhancement factors not determined by a jury. In view of *Blakely*, the defendant's sentence of ten years is reduced to eight years. We affirm the conviction and modify the sentence to eight years.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part and Reversed in Part

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Randy G. Rogers, Athens, Tennessee, for the appellant, Hubert Ray.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Robert Steve Bebb, District Attorney General; and Andrew Freiberg, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves a sexual offense committed by the defendant against the victim, his ten-year-old granddaughter. The testimony elicited at trial demonstrated that the defendant picked up the victim and her sister from school on May 22, 2004. During the drive to his home, the defendant reached into the backseat where the victim was seated and touched the child on her "private area" inside her shorts. The victim said that the defendant put his hand under her shorts and tickled inside her private area. She told him to stop, but he did not. When he removed his hand from her shorts, he put his hand in his mouth.

Following a jury trial, the defendant was found guilty of committing the offense of aggravated sexual battery, a lesser included offense of the crime for which he was indicted, rape of a child. Following a sentencing hearing, the trial court sentenced the defendant to ten years in the Tennessee Department of Correction, and he was permanently restrained from contacting the victim. He was further ordered to register as a sex offender.

Analysis

On appeal, he argues that the trial court erred in overruling his motion for directed verdict at the conclusion of proof because the trial court did not have appropriate jurisdiction and venue. Specifically, the defendant contends that sufficient evidence was not presented to establish venue in the Ducktown Law Court. There is no dispute that the offense occurred in Polk County and that sufficient evidence was presented to establish venue in the county. However, the defendant argues that the record does not affirmatively establish that this offense occurred within the Third Civil District of Polk County, the portion of the county for which the Ducktown Law Court has exclusive jurisdiction over both civil and criminal actions.

This court has previously analyzed the jurisdiction of the Ducktown Law Court. In *State v. Harris*, 1990 Tenn. Crim. App. LEXIS 486 (Tenn. Crim. App. at Knoxville, July 25, 1990), this court provided some historical background on the division of the Polk County courts.

> The Constitution of Tennessee provides that "[t]he judicial power of this State shall be vested in one Supreme Court and in such other Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish." Article 6, Section 1, Tennessee Constitution. By Chapter CXX of the Public Acts of 1873, the General Assembly created the "Law Court of Ducktown" for the Seventh, Eighth and Tenth Civil Districts of Polk County to be one of the courts of the Fourth Judicial Circuit, presided over by the judge of that Circuit. The statute provided that this Court had general common law jurisdiction, both original and appellate, in all cases at law of a civil or criminal character, arising in those three civil districts, and further provided that "no resident of said districts shall be sued in the Circuit Court of Polk County, nor be presented or indicted therein, unless the offense was committed in the county outside of the (named) districts." After passage by the General Assembly, this act was approved by Governor John C. Brown on March 25, 1873. By its terms, the act took effect on that date.
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> Six years later on March 26, 1879, Governor Albert S. Marks approved Chapter CLXXIII of the Public Acts of 1879, which repealed the act establishing the law court and abolished the court forever.
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> Subsequently chapter 413 of the Private Acts of 1911 was passed and approved by Governor Ben W. Hooper on June 27, 1911, reestablishing the Law Court of Ducktown for the Seventh, Eighth and Tenth Civil Districts of Polk County. This act was almost identical to the earlier act. Section 3 of the act provided that the

> Law Court of Ducktown shall have "all the powers within its local jurisdiction that belong by law to the Circuit Court of this State." This act, like its predecessor, provided for exclusive, general common law jurisdiction in all cases both civil and criminal arising within the named civil districts, and specifically prohibited the presentment or indictment of "any resident of said districts" in the Circuit Court of Polk County "unless the offense was committed in the county outside of the districts named" in the act.
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> Over the years the district lines of Polk County were redrawn. Chapter 37, Private Acts of 1915; Chapter 250, Private Acts of 1929; Chapter 678, Private Acts of 1931.
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> During one session of the General Assembly, two acts were passed changing the dates for the terms of Court of the Law Court of Ducktown. Chapter 218, Private Acts of 1925; Chapter 553, Private Acts of 1925.

State v. Harris, 1990 Tenn. Crim. App. LEXIS 486, at 2-4 (Tenn. Crim. App. July 25, 1990)

The defendant was indicted in the "Ducktown Law Court, Third Civil District." There is no dispute that the jurisdiction of the Ducktown Law Court presently encompasses the Third Civil District of Polk County. Criminal cases arising from the civil districts within the jurisdiction of the Ducktown Law Court, which consists of the Third Civil District of Polk County, are tried in that court.

The defendant does not establish that the events underlying the offense occurred outside the Third Civil District of Polk County nor does he demonstrate that the Ducktown Law Court was without jurisdiction of this case. He argues that the evidence of venue as presented at trial was insufficient, based on the absence of specific proof that the offense occurred within the Third Civil District of Polk County. However, Article I, section 9 of the Tennessee Constitution mandates only that a defendant shall have the right to trial "by an impartial jury of the county in which the crime shall have been committed." Testimony reflected that the victim's school, the defendant's house, and the roadway between them are located in Polk County. Further, the defendant conceded that there had been circumstantial evidence presented that "this is in Polk County." There is no genuine dispute that the events underlying the crime occurred in Polk County. Therefore, no constitutional right of the defendant has been abridged. *See State v. Harris*, 678 S.W.2d 473, 475 (Tenn. Crim. App. 1984).

Recently, this court concluded in *State v. David Gaddis*, No. E2008-00812-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 907, at *20-21 (Tenn. Crim. App. Knoxville, Nov. 10, 2008), that when a court exercises general jurisdiction, there is a presumption that no jurisdictional defect exists in the absence of an affirmative showing to the contrary. The defendant must affirmatively show, or the record must affirmatively demonstrate, that the defendant was tried in the wrong court. *Id.* (citing *Harris*, 678 S.W.2d at 475-76.) Here, the defendant contends that the State was required to establish that the offenses occurred within the portion of Polk County which falls within the

exclusive jurisdiction of the Ducktown Law Court rather than the jurisdiction of the Polk County Circuit Court. The jury was instructed on venue and found by a preponderance of the evidence that the defendant committed this offense within the Third Civil District of Polk County. The defendant has not demonstrated that he was tried in the wrong court. Therefore, his issue is without merit.

Next, the defendant argues that the trial court erred by giving sequential jury instructions as to the lesser included offenses charged to the jury. The Tennessee Pattern Jury Instructions designate that a jury should consider the greater charged offense before considering the lesser included offenses in descending, "sequential order." See 1-41 T.P.I. Criminal 41.01. Tennessee courts have upheld sequential jury instructions. *State v. Raines*, 882 S.W.2d 376, 382 (Tenn. Crim. App. 1994); *see also State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997). The jury acquitted the defendant of rape of a child and attempted rape of a child but convicted him of aggravated sexual battery. The defendant cannot establish an abuse of discretion in the trial court's instruction on lesser included offenses that were consistent with the pattern jury instructions.

Next, the defendant argues that the trial court sentenced him improperly by applying enhancement factors under Tennessee Code Annotated section 40-35-114. At the time of sentencing in this case, July 10, 2006, the Tennessee Supreme Court had held that sentencing under *State v. Gomez*, 163 S.W.3d 632, 654-61 (Tenn. 2005) (*Gomez I*), was not plain error because the Tennessee Criminal Sentencing Reform Act of 1989 did not run afoul of the Sixth Amendment as interpreted in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Under *Blakely*, the "statutory maximum"sentence which may be imposed is the presumptive sentence applicable to the conviction offense. *Id*. at 304-05, 124 S. Ct. at 2538. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant. *State v. Corey Finley*, No. W2007-02321-CCA-RM-CD, 2008 Tenn. Crim. App. LEXIS 204 at *4, (Tenn. Crim. App. at Jackson, Mar. 18, 2008).

On January 22, 2007, the United States Supreme Court released its decision in *Cunningham v. California,* 549 U.S. 270, 127 S. Ct. 856 (2007), holding that California's sentencing scheme did not survive Sixth Amendment scrutiny under *Blakely*. In short, the *Blakey-Cunningham* regime controls the present case, and that regime instructs us that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)); *see State v. Finley*, 2008 Tenn. Crim. App. LEXIS 204, **4-5 (Tenn. Crim. App. Mar. 18, 2008); *State v. Schiefelbein*, 230 S.W.3d 88, 149 (Tenn. Crim. App. 2007), rehearing granted (Mar. 7, 2007) (order on petition to rehear modifying defendants' sentences pursuant to *Blakely* and *Cunningham*)(*Cunningham* did apply the *coup de grace* to the rationale employed in Tennessee's pre-2005 sentencing law.)).

In the present case, although the offense was committed before *Blakely* was filed, the defendant was sentenced after *Blakely* was filed and during the erstwhile reign of *Gomez I.* The defendant did not execute a waiver as a means of electing sentencing via the *Blakely*-compliant 2005

amendments to the sentencing law. Thus, the holding of *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), is relevant to this case. We note, however, that the defendant failed to raise the *Blakely* violation at sentencing or on direct appeal. Moreover, on appeal, he simply argues that the enhancement factors considered were improperly applied. No mention is made of *Blakely* or its progeny. Nonetheless, we shall review the issue of sentencing.

The United States Supreme Court, in adjudicating a *Blakely* claim, said that not every *Blakely*-deficient sentence "gives rise to a Sixth Amendment violation . . . [nor will] every appeal . . . lead to a new sentencing hearing." *United States v. Booker*, 543 U.S. 220, 268, 125 S. Ct. 738, 769 (2005). The Supreme Court further stated, "[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Id.*

We shall review the issue of sentencing under the procedure for plain error review because the defendant's failure to raise the *Blakely* issue deprives him of plenary review. For an error to be "plain error," it must be "plain" and must affect a substantial right of the accused. The term "plain" equates to "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). Plain error is not error that is simply conspicuous; rather, it is especially egregious error that strikes at the fairness, integrity, or public repudiation of judicial proceedings. *See State v. Wooden*, 658 S.W.2d 553, 559 (Tenn. Crim. App. 1983).

In *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994), this court defined a substantial right as "a right of 'fundamental proportions in the indictment process, a right to the proof of every element of the offense and . . . constitutional in nature.'" *Id*. at 639. In that case, this court established five factors to be applied in determining whether an error is plain:

(a) the record must clearly establish what occurred in the trial court;
(b) a clear and unequivocal rule of law must have been breached;
(c) a substantial right of the accused must have been adversely affected;
(d) the accused [must not have waived] the issue for tactical reasons; and
(e) consideration of the error must be necessary to do substantial justice.

Id. at 641-42 (footnotes omitted). Our supreme court characterized the *Adkisson* test as a clear and meaningful standard and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

Looking first to the adequacy of the record before us, including the presentence report and the transcripts of the trial and the sentencing hearing, we glean the trial court's bases for enhancing the defendant's sentence from the presumptive sentence of eight years to ten years. *See* T.C.A. § 40-35-210(c) (2006) ("The presumptive sentence for a Class B felony shall be the minimum sentence within the range of punishment. . . ."). The trial court enhanced the defendant's sentence based upon the infliction of particularly great injuries upon the victim, the defendant's failure to comply with the conditions of a sentence involving release into the community, and his abuse of a position of

trust. *See id.* § 40-35-114(6), (8), (14) (2003). We deem the record adequate for review on the merits.

The issue at stake is the defendant's Sixth Amendment right to have a jury determine the factors that enhance his sentence beyond the presumptive sentence of eight years. In *Gomez II*, our supreme court determined that *Gomez'* sentence enhancement violated a clear and unequivocal rule of law for purposes of noticing plain error. *Gomez II*, 239 S.W.3d at 740-41. As in *Gomez II*, the *Blakely* claim in the present case implicates a clear and unequivocal rule of law.

Looking next to whether the claimed violation of the Sixth Amendment adversely affected a substantial right of the defendant, the trial court utilized at least three enhancement factors that involved factual determinations of the "type . . . prohibited by *Apprendi*." *See Gomez II*, 239 S.W.3d at 743. Thus, as in *Gomez II*, the enhancement of the sentence via multiple factors adversely affected a substantial right of the defendant.

"The fourth consideration for plain error review is whether the record indicates that the [d]efendant[] waived [his] Sixth Amendment claims for tactical reasons." *Id*. at 741. As in *Gomez II*, "the record in this case is silent and does not establish that the [d]efendant[] made a tactical decision to waive [his] Sixth Amendment claims." *See id.* at 742. Thus, the record evinces no basis in tactics or strategy for rejecting plain error review.

Finally, we examine the need for assuring substantial justice as a basis for noticing plain error. In *Gomez II*, our supreme court, in examining whether substantial justice had been availed or withheld, looked at the relative impact on the sentence enhancement of *Gomez's* prior criminal record vis a vis the other *Blakely*-infirm factors. The court commented that, as a reviewing appellate court, it was authorized to "[a]ffirm, reduce, vacate or set aside the sentence imposed," *id.* at 743 (quoting T.C.A. § 40-35-401(c)(2) (2006)), suggesting that, if it could, the court would look at the sentence it would impose using the *Blakely*-compliant enhancement factor of prior criminal record to determine whether the trial court's use of other factors deprived the defendant of substantial justice. Here, the defendant has no prior record; therefore, he was deprived of substantial justice because no available enhancement factor exists to increase the defendant's sentence from the presumptive minimum. We are thus compelled to amend the defendant's sentence from ten years to eight years.

Conclusion

Based on the foregoing and the record as a whole, we affirm in part and reverse in part. The evidence was sufficient to establish venue, and the jury was properly instructed. However, the defendant's sentence was enhanced by applying enhancement factors not determined by a jury in violation of *Blakely*; therefore, the defendant's sentence of ten years is modified to eight years.

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JOHN EVERETT WILLIAMS, JUDGE